Dea Ai Eng (P) v Dr Wong Seak Shoon & Anor

HIGH COURT (IPOH) — CIVIL SUIT NO 22–87 OF 2002
VT SINGHAM J
27 DECEMBER 2006

Civil Procedure — Subpoena — Setting aside — Subpoena duces tecum to compel the expert witness to attend court, to give evidence and to bring the medical report — Whether opinion and medical report prepared by expert witnesses was subject of a pending or for existing litigation — Whether evidence given protected by legal professional privilege — Whether there was an agreement or condition express or implied between parties for disclosure and exchange of medical report or to be produced through expert witness — Balance of materiality of witness's evidence — Whether subpoena violated general principles

The plaintiff filed an action for damages against the defendants for medical negligence. The defendants have filed a statement of defence resisting the plaintiff's claim. This was an application filed by the first defendant to set aside the subpoena served on Dato' (Dr) P Kandasamy who was the expert witness of the first defendant ('the expert witness'). The subpoena which was issued to was subpoena duces tecum in Form 69 of the Rules of the High Court 1980 to compel the expert witness to attend court, to give evidence and also to bring with him the medical report which had been specified in the subpoena.

Held, allowing the application:

(1) The medical report prepared by the expert witness was at the instance of the first defendant's solicitors for use in the pending litigation. Therefore, the opinion and medical report prepared by the expert witnesses was the subject of a pending or existing litigation. The first defendant therefore, was entitled to object to the expert witness giving evidence to express his opinion for the plaintiff. In other words, reports which are prepared by experts for the purpose of litigation are privileged and therefore parties are not obliged to disclose them to each other. This safeguard against an expert witness giving evidence on more than one side is protected by the existence of legal professional privilege (see para 20); *Waugh v British Railways Board* [1980] AC 521 and *Yap Hong Choon v Dr Pritam Singh* [2006] CLJ 842 followed.

(2) There was no material or evidence produced by the plaintiff of any agreement or condition express or implied between the parties for disclosure and exchange of the medical report or to be produced through the expert witness. Therefore, the expert witness cannot be compelled to produce the medical report by the subpoena (see para 25).

(3) It is for the party issuing the subpoena to show on balance the materiality of the witness's evidence. The plaintiff had failed to show any materiality of the expert witness's evidence as there was no affidavit in reply of the plaintiff (see para 12).

(4) The subpoena served on the expert witness had violated the general principles applicable to subpoena duces tecum (see para 16).

[Bahasa Malaysia summary

Plaintif telah memfailkan satu tindakan untuk ganti rugi terhadap defendan-defendan kerana kecuaian perubatan. Defendan-defendan telah memfailkan satu penyataan pembelaan menolak tuntutan plaintif. Ini adalah satu permohonan yang difailkan oleh defendan pertama untuk mengetepikan subpoena yang disampaikan ke atas Dato' (Dr) P Kandasamy yang merupakan saksi pakar defendan pertama ('saksi pakar'). Subpoena yang dikeluarkan adalah subpoena duces tecum dalam Borang 69 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk mendesak saksi pakar menhgadiri mahkamah, untuk memberikan keterangan dan juga membawa bersamanya laporan perubatan yang ditetapkan dalam subpoena tersebut.

Diputuskan, membenarkan permohonan tersebut:

(1) Laporan perubatan yang disediakn oleh saksi pakar tersedia untuk digunakan oelh peguam defendan pertama dalam litigasi yang belum selesai ini. Oleh itu, pendapat dan laporan perubatan yang disediakan oleh saksi pakar tersebut tertakluk kepada litigasi yang belum selesai atau yang wujud. Defendan pertama oleh demikian, berhak untuk membantah terhadap saksi pakar memberikan keterangan untuk menyatakan pendapatnya bagi pihak plaintif. Dalam ertikata lain, laporan yang disedikan oleh pakar bagi tujuan litigasi adalah dilindungi dan pihak-pihak tidak berhak mendedahkannya kepada satu sama lain. Pelindungan terhadap saksi pakar memberikan keterangan lebih daripada satu pihak adalah dilindungi dengan adanya perlindungan profesyen undang-undang (lihat perenggan 20); *Waugh v British Railways Board* [1980] AC 521 dan *Yap Hong Choon v Dr Pritam Singh* [2006] CLJ 842 diikut.

(2) Tiada bahan atau keterangan yang dikemukakan oleh plaintif tentang apa-apa perjanjian atau syarat nyata atau tersirat antara pihak-pihak tentang pendedahan dan pertukaran laporan perubatan atau ia dikemukakan melalui saksi pakar. Oleh itu, saksi pakar tidak boleh dipaksa mengemukakan laporan perubatan melalui subpoena (lihat perenggan 25).

(3) Adalah untuk pihak yang mengeluarkan subpoena tersebut menunjukkan atas imbangan kepentingan keterangan sakasi tersebut. Plaintif telah gagal untuk menunjukkan apa-apa yang penting tentang keterangan saksi pakar itu kerana tiada afidavit jawapan plaintif (lihat perenggan 12).

(4) Subpoena yang disamapaikan ke atas saksi pakar telah melanggar prinsip-prinsip am yang digunakan untuk subpoena duces tecum (lihat perenggan 16).]

Notes

For a case on setting aside subpoena, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 6015.

Cases referred to

Aegis Blaze, The [1986] 1 Lloyd's Rep 203 (refd)
Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)
Asbeston Insurance, Re [1985] 1 WLR 331 (refd)
Baker v Campbell (1983) 153 CLR 52 (refd)
Barclays Bank PLC & Ors v Eustice & Ors [1995] 1 WLR 1238 (refd)
Burchard v Macfarlane (1891) 2 QB 241 (refd)
Calcraft v Guest [1898] 1 QB 750 (refd)
Causton v Mann, Egerton (Johnson) Ltd [1974] 1 WLR 162 (refd)
Clough v Tameside and Glossop Health Authority 42 BMLR 166 (QBD) (refd)
Dr Pritam Singh v Yap Hong Choon [2006] 1 MLJ 31 (refd)
Dubai Bank Ltd v Galadari & Ors [1990] 1 Ch 98 (refd)
Faridah Ariffin v Dr Lee Hock Bee & Anor [2006] 1 CLJ 660 (refd)
Farulli v Farulli and Pedorzoli 1917 P28 (refd)
George Johnston v National Cold Board 1968 sc 128 (refd)
Global Info Ltd, Re 1999 1 BCLC 74 (refd)
Grant v Downs (1976) 135 CLR 674 (refd)
Harmony Shipping Co SA v Davis & Ors [1979] 3 All ER 177 (refd)
Ismail v Hasnul, Abdul Ghafar v Hasnul [1968] 1 MLJ 108 (refd)
Johnson & Anor v Saxton & Anor [1962] All ER 92 (refd)
King v Baines, The [1909] 1 KB 258 (refd)
L (A Minor) (Police Investigation Privilege), Re [1997] 3 WLR 16 (refd)
Lee v Angas 1866 LR 2 Eq 59 (refd)
London and Globe Finance Corporation Limited v Kaufman (1899) WN 240 (refd)
Lorenzo Halcoussi, The [1988] 1 Lloyd's Rep 180 (refd)
Louis James Carter v The Mvanaging Partner Northmore Hale Davy & Leake & Ors [1995] 3 CLJ 451 (refd)
Lyell v Kennedy (No 3) (1884) 27 Ch D1 (refd)
Macbryan v Brooke [1946] 2 All ER 688 (refd)
Macmillan Inc v Bishopsgate Investment Trust plc [1993] 4 All ER 998 (refd)
Marcel v Commisioner of Police of the Metropolis [1992] 1 All ER 72 (refd)
Morgan v Morgan [1977] 2 All ER 515 (refd)
National Employer's Mutual General Insurance Association Ltd v Waind (1979) 141 CLR. 648 (refd)
Naylor v Preston Area Health Authority and other appeals [1987] 2 All ER 354 (refd)
Ng Hee Thoong v Public Bank Bhd [1995] 1 MLJ 285 (refd)
O'Reilly v The Commissioners of the State Bank of Victoria & Ors (1983) 153 CLR 1 (refd)
Oxfordshire Country Council v M & Anor [1994] 2 All ER 269 (refd)
Pearce v Foster (1885) 15 QBD 114 (refd)
Pit Stop Auto Accessories v Tan Kock Stang; Minister of Communications [1974] 2 MLJ 79 (refd)
R v Davies EWCA Crim 85 (refd)
R v Hurle-Hobbs [1945] 1 All ER 273 (refd)

Rahman v Kirklees Area Health Authority [1980] 3 All ER 610 (refd)
Raymond v Tapson (1882) 22 Ch D 430 (refd)
S County Council v B [2000] 3 WLR 53 (refd)
Sandford v Remington 30 ER 587 (refd)
Saxton, decd, In re [1962] 1 WLR 968; [1962] 3 All ER 92 (refd)
Schneider v Leigh [1955] 2 QB 195 (refd)
Senior v Holdsworth; ex p Independent Television News [1975] 2 All ER 100 (refd)
Ventouris v Mountain (The Italia Express) [1991] 1 WLR 607 (refd)
Wakefield v Outhwaite [1990] 2 Lloyd's Rep 157 (refd)
Waugh v British Railways Board [1979] 2 All ER 1168 (refd)
Waugh v British Railways Board [1980] AC 521 (folld)
Wheeler v Le Marchant (1881) 17 Ch D 675 (refd)
Wilson v Rastall 10 ER 1283 (refd)
Wong Sin Chong & Anor v Bhagwan Singh [1993] 3 MLJ 679 (refd)
Worall v Reich [1955] 1 QB 296 (refd)
Yap Hong Choon v Dr Pritam Singh [2006] 1 CLJ 842 (folld)
Young v National Coal Board 1957 SLT 266; 1957 SC 99 (refd)

Legislation referred to

Evidence Act 1950 s 126
Rules of the High Court 1980 O 24 r 1(1), O 34 r 4(2)(f), (j), O 38 r 14

Yeow Khoon Kwong (Yeow & Co) for the plaintiff.
Raja Eileen Soraya bte Raja Aman (Ding Jo Ann) (Raja Darryl & Loh) For the first defendant.
Leong Choo Kong (CK Leong & Co) for the second defendant.

VT Singham J:

[1] This is an application (encl 64) filed by the first defendant to set aside the subpoena dated 28 August 2006 (encl 58) served on Dato' (Dr) P Kandasamy who is the expert witness of the first defendant. ('the expert witness'). The said application is supported by the affidavit of the expert witness affirmed on 9 October 2006 (encl 65). Subpoena is a writ issued in an action or suit requiring the person to whom it is directed to be present at a specified place, date and time, and for a specific purpose. In the instant case, the subpoena (exh K-2) referred to in the affidavit of the expert witness (encl 65) which was issued to is subpoena duces tecum in Form 69 of the Rules of the High Court 1980 to compel the expert witness to attend this court, to give evidence and also to bring with him the medical report which has been specified in the subpoena.

[2] In this case, the plaintiff has filed an action for damages against the defendants for medical negligence which was alleged to have occurred on 28 May 2001 (see Pernyataan Tuntutan Terpinda Semula Kali Kedua (encl 56)). The defendants have filed a statement of defence resisting the plaintiff's claim (see Pembelaan Terpinda Semula Defendan Pertama (encl 66)).

[3] As stated above, the subpoena exh (K-2) referred to in the affidavit (encl 65) which was issued at the instance of the plaintiff and served on the expert witness required the expert witness to give evidence on behalf of the plaintiff at the trial and to produce the medical report of the plaintiff which the expert witness had carried out an examination on 19 May 2003.

[4] The issues raised in this application are said to be of general importance, since all or most of these issues arise in almost every medical negligence action or personal injury action arising of road or industrial accidents.

[5] The ground relied on by learned counsel for the first defendant to set aside the subpoena is two fold: (i) privilege, ie communication between the solicitor and client, in the instant case, between the expert witness and the first defendant's solicitor, (ii) litigation privilege, and in support of the arguments, learned counsel had referred to both local cases and, cases of other jurisdictions, namely:

(i) *Causton v Mann Egerton (Johnsons) Ltd* [1974] 1 All ER 453;

(ii) *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679;

(iii) *S County Council v B* [2000] 3 WLR 53;

(iv) *Re L (A Minor) (Police Investigation Privilege)* [1997] 3 WLR 16;

(v) *Johnson & Anor v Saxton & Anor* [1962] All ER 92;

(vi) *Worrall v Reich* [1955] 1 QB 29;

(vii) *Faridah Ariffin v Dr Lee Hock Bee & Anor* [2000] 1 CLJ 660;

(viii) *Yap Hong Choon v Dr Pritam Singh* [2006] 1 CLJ 842;

(ix) *R v Davies* EWCA Crim 85;

(x) *Waugh v British Railways Board* [1979] 2 All ER 1168;

(xi) *Re Saxton (deceased)* [1962] 3 All ER 92;

(xii) *Louis James Carter v The Managing Partner Northmore Hale Davy & Leake & Ors* [1995] 3 CLJ 451.

[6] On the other hand, in opposing the said application (encl 64), learned counsel for the plaintiff who did not file any affidavit in reply to the said application submitted from the Bar as follows:

(a) the said application did not merit a reply by an affidavit;

(b) the consent given by the plaintiff's solicitors for the plaintiff's examination on 19 May 2003 was subject to conditions, inter alia, the first defendant's solicitors is to furnish the copy of the medical report by the expert witness after his examination.

(c) there is no property in a witness, be it an expert witness and in support he relied on the following cases:

(i) *Harmony Shipping Co SA v Davis & Ors* [1979] 3 All ER 177; A

(ii) *Clough v Tameside and Glossop Health Authority* 42 BMLR 166.

[7] The first defendant's counsel, YM Raja Eileen Soraya bte Raja Aman sprang to her feet when the second ground was raised by the plaintiff's counsel, namely, that the consent given by the plaintiff's solicitor for the plaintiff's examination on 19 May 2003 was on the condition that the first defendant's solicitor furnish a copy of the medical report by the expert witness after the examination. The learned counsel for the first defendant denied that there was such an agreement to supply a copy of the medical report to the plaintiff's solicitors and objected to plaintiff's counsel giving evidence from the Bar and submitted that if this allegation was to be raised, it must be by an affidavit so that the first defendant could rebut the same. B C

[8] In order to determine two competing principles, one being that all relevant evidence should be made available for the court to ascertain the truth, and the other, communications between lawyer and client should be allowed to remain confidential and privilege, this court has to do a balancing exercise (see *Dubai Bank Ltd v Galadari & Ors* [1990] 1 Ch 98, *Naylor v Preston Area Health Authority and other appeals* [1987] 2 All ER 353, and *Barclays Bank PLC & Ors v Eustice & Ors* [1995] 1 WLR 1238). D

[9] It is not in dispute that the plaintiff was examined on 19 May 2003 by the expert witness at the request of the first defendant's solicitors to which the plaintiff had consented. However, there is no evidence produced by the plaintiff that the first defendant or his solicitors had agreed as a condition to the plaintiff consenting to the examination to supply the medical report on the examination of the plaintiff on 19 May 2003 by the expert witness to the plaintiff or her solicitors except for a bare statement of the plaintiff's counsel from the Bar (see *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 281 at p 287). E F

[10] In the instant case, it cannot be disputed that the medical opinion of the expert witness which was sought by the first defendant was for use in a pending litigation. Therefore, in accordance with the principle laid in *Waugh v British Railways Board* [1980] AC 521 which was applied in *Yap Hong Choon v Dr Pritam Singh* [2006] 1 CLJ 842, this court is of the considered view that on the facts in the instant case, the medical report and the opinion of the expert witness is protected by the Legal Professional Privilege. The dominant purpose for which the report was prepared by the expert witness was that of submitting it to the first defendant's legal adviser for an advise and if necessary for use in the pending litigation. Therefore, it is a document required for use in a pending litigation and it was the dominant purpose for the same (see*Causton v Mann Eagerton (Johnson) Ltd* [1974] 1 All ER 453 at p 460, *Waugh v British Railways Board* [1980] AC 521. However, in *Waugh v British Railways Board*, an investigation report concerning an accident was held not to be privileged because it was not made for the dominant purpose of litigation. In *Ventouris v Mountain (The Italia Express)* [1991] 1 WLR 607 at pp 621–622, the Court of Appeal, determined that the privilege is based on the purpose for which the document was brought into existence rather than the purpose for which it was obtained (see also *Lyell v Kennedy (No 3)* (1884) 27 Ch D1)). G H I

[11] Before going into the details and considering the law on legal professional privilege, this court must first direct its judicial mind to the said application itself, ie the application by the first defendant to set aside the service of the writ of subpoena duces tecum dated 28 August 2006 (encl 58) which was issued out of the Registry of the High Court Ipoh at the instant of the plaintiff and directed to the expert witness. However, this court, with respect, must point out that in arguing this application, learned counsel for the first defendant had focussed her attention mainly to the legal professional privilege which is generally dealt with in an application for discovery of documents instead of directing her submission to the law on setting aside a subpoena. Nevertheless, it must be noted that the submission and the cases cited still has bearing on the just decision of this court in respect of the said application to set aside the subpoena. As noted above, this court finds that the bulk of the submission seemed to have been concentrated and directed to the law on discovery and exchange of document as in the case of *Yap Hong Choon v Dr Pritam Singh* [2006] 1 CLJ 842 which was in reference to a pre-trial case management under O 34 r 4(2) of the Rules of the High Court 1980 ('the RHC') and not under O 38 r 14 of the RHC which is the relevant law applicable to the issuance of the subpoena.

[12] In respect of the present application of the first defendant, it must be made clear at the outset, the court has an inherent jurisdiction to set aside a subpoena which is issued on the basis of improper motive or to prevent an abuse of process or for the purpose of 'fishing' for evidence or is speculative or oppressive in nature (see *Pit Stop Auto Accessories v Tan Kock Stang; Minister of Communications* [1974] 2 MLJ 79, *Ismail v Hasnul, Abdul Ghafar v Hasnul* [1968] 1 MLJ 108, *Raymond v Tapson* (1882) 22 Ch D 430). Oppressive subpoena duces tecum relates to documents, discovery of which has already been refused by the court. (see *R Baines* [1909] 1 KB 258 (violation of witness's privacy if particular evidence revealed could amount to oppression); *R Mundell, Fenton v Cumberlege* (1883) 52 LJ Ch 756, *London and Globe Finance Corp v Kaufman* (1899) 69 LJ Ch 196, *Farulli v Farulli and Pedorzoli* 1917 P28, *Macbryan v Brooke* [1946] 2 All ER 688). It is for the party issuing the subpoena to show on balance the materiality of the witness's evidence. In the instant case, the plaintiff had failed to show any materiality of the witness's evidence as there is no affidavit in reply of the plaintiff except a statement made by the learned counsel for the plaintiff from the Bar (see *Wong Sin Chong v Bhagwan Singh* [1993] 3 MLJ 679, *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382, *Ng Hee Thong v Public Bank Bhd* [1995] 1 MLJ 281 at p 286).

GENERAL PRINCIPLES APPLICABLE TO SUBPOENAS DUCES TECUM

[13] The general principles applicable to subpoenas duces tecum are as follows: (see *Re Global Info Ltd* 1999 1 BCLC 74 and *Ismail v Hasnul, Abdul Ghafar v Hasnul* [1968] 1 MLJ 108).

(i) the documents must be specifically identified (see *Lee v Angas* 1866 LR 2 Eq 59 at p 63, *Wakefield v Outhwaite* [1990] 2 Lloyd's Rep 157 at p 160);

(ii) A subpoena may not be used as an instrument to obtain discovery (see *The Lorenzo Halcoussi* [1988] 1 Lloyd's Rep 180 at p 184; *Macmillan Inc v Bishopsgate Investment Trust plc* [1993] 4 All ER 998 at p 1005);

(iii) a subpoena must not be of a 'fishing or speculative' nature (see *The Lorenzo Halcoussi* 1988 1 Llyod's Rep 180 at p 184, and *Re Asbeston Insurance* [1985] 1 WLR 331 at p 338A);

(iv) Production must be necessary for the fair disposal of the action or to save costs; (see *Marcel v Commisioner of Police of the Metropolis* [1992] 1 All ER 72 at pp 82–83);

(v) confidentiality (see *Morgan v Morgan* [1977] 2 All ER 515);

(vi) variation of a subpoena (see *Wakefield v Outhwaite* [1990] 2 Lloyd's Rep 157 at p 165 and *The Lorenzo Halcoussi* [1988] 1 Lloyd's Rep 180 at p 185).

[14] A writ of subpoena may be issued by a party at any stage of a trial without the leave of the court. A subpoena is an order to produce a document to the court and not the other party and technically the other party has no right to see the document without the leave of the court. A witness may insist that the document should not be handed to the parties even at the trial but the judge may, if satisfied that it is evidence in the case for either party, order that it be read.

[15] In *Burchard v Macfarlane* (1891) 2 QB 241, Lord Esher MR at pp 247–248 said:

> A subpoena duces tecum was an order from the court to a person to produce a document which was alleged to be in his possession- to produce it to the court at the trial, and not to produce it to the parties, for, under subpoena duces tecum, when a witness brought the document into court the parties could not ask him for it. The parties have no right to see it, and all that could be done on a subpoena duces tecum was that the witness produced the documents to the court, subject to the order of the court, not to the parties; and he might insist that his documents should not be handed to the parties even at the trial. All that could be done was that the judge, when he was satisfied that it was evidence in the case for either parties, might order it to be read.

However, the court has also the discretion to exercise control over the privilege to prevent it from being oppressively used (see *Ismail v Hasnul, Abdul Ghafar v Hasnul* [1968] 1 MLJ 108, *Senior v Holdsworth; ex p Independent Television News* [1975] 2 All ER 100, *Wong Sin Chong & Anor v Bhagwan Singh* [1993] 3 MLJ 679 at p 687, *George Johnston v National Cold Board* 1968 sc 128, *Raymond v Tapson* (1883) 22 Ch D 430, *The King v Baines* [1909] 1 KB 258, *Morgan v Morgan* [1977] 2 All ER 515, *London And Globe Finance Corporation Limited v Kaufman* (1899) WN 240, and *R v Hurle-Hobbs* [1945] 1 All ER 273).

[16] It is the considered view of this court that violation of any one of the principles set out above, is sufficient of itself to justify the court in setting aside the subpoena. On the set of facts in the instant case, this court is satisfied that the subpoena served on the expert witness has violated the second, third and fifth principles referred to above.

[17] In *Senior v Holdsworth; ex p Independent Television News* [1975] 2 All ER 100, Lord Denning MR at p 1013 said:

> If the person summoned takes objection to it, he can wait till the trial and take his objection there, In the old days, if he did this, he had to do it himself and was not allowed counsel to do it for him (see *Doe d Rowcliffe v Egremont* (1841) 2 M & R 386). Nowadays, of course, he can do it by counsel. The better course is, however, for him to apply before the trial to set aside the summons. The application is heard by the country court judge. The summons will be set aside if the witness has no material documents or if it is oppressive or there is any other sufficient reason to set it aside. (see *Steele v Savory* (1891) 8 TLR 94 and *R Lewis Justices, ex parte Gaming Board of Great Britain* [1971] 2 All ER 1126 at p 1132.

At p 1022, Lord Denning MR said:

> The law, as it now stands, does not enable the court to refuse to issue witness summons (or subpoena) for the production of document on due application. The remedy available to the person served is to move to set the summons aside. On such application the court will set it aside if what is sought is irrelevant, oppressive, an abuse of the process of court or recognised by the law as being privileged from production. Further, even if the document sought be relevant and not otherwise privileged from production, the court has a residual discretion in certain circumstances to protect the document and set the summons aside.

[18] Notwithstanding that the bulk of the submission by learned counsel for the first defendant was directed to the legal professional privilege and did not address in detail to the law applicable in setting aside a subpoena it will not be complete and becomes necessary for this court to consider the submissions as advanced by both learned counsels on the legal issues, namely, privilege communication between solicitors and client, litigation privilege and property in a witness, where learned counsel for the second defendant has supported the said application filed by the first defendant's solicitors.

[19] Generally, in so far as witnesses of fact are concerned, the law is that there is no property in a witness (see *Harmony Shipping Co SA v Davis & Ors* [1979] 3 All ER 177 at p 180). Similarly, there is no property in an expert witness as to the facts he has observed and his own independent opinion on them no matter by which side he has been instructed subject to an exception being the legal professional privilege. However, it is important to observe that the primary duty of the court in any trial is to ascertain the truth and the court is entitle to the best evidence which means both factors must be considered on the particulars set of facts in each case. The unusual and peculiar facts and circumstances that have been described in *Clough v Tameside and Glossop Health Authority* 42 BMLR 166 (QBD) and relied on by learned counsel for the plaintiff can easily be distinguished with the facts and circumstances in the instant case. In *Clough v Tameside & Glossop Health Authority*, the defendant had already disclosed to the plaintiff the medical report prepared by Dr Hay which contained among other the communication from Dr Pandy among other documents sent by the defendant's solicitors. The plaintiff applied to the District Judge for disclosure of Dr Pandy's report for the fair disposal of the case but the defendants resisted the application. The District Judge ordered the disclosure of the medical report. The defendants appealed, contending inter alia, that since Dr Pandy had been prepared for the purpose of litigation it was privileged and remained so. On appeal, it was held inter alia, since the medical report had been served on the plaintiff, the privilege in respect of both reports was waived although it had been obtained for use

in litigation in respect of the report within the ambit of *Waugh v British Railways Board* [1979] 2 All ER 1168. Accordingly, the appeal was dismissed.

[20] On the other hand, the position in the instant case can easily be distinguished on the facts and circumstances. The medical report prepared by the expert witness was at the instance of the first defendant's solicitors for use in the pending litigation. Therefore, the opinion and medical report prepared by the expert witnesses was the subject of a pending or for the existing litigation. The first defendant therefore, is entitle to object to the expert witness giving evidence to express his opinion for the plaintiff. In other words, reports which are prepared by experts for the purpose of litigation are privileged and therefore parties are not obliged to disclose them to each other (see *Evidence, Advocacy and the Litigation Process* by Jeffrey Pinsler). This safeguard against an expert witness giving evidence on more than one side is protected by the existence of legal professional privilege (see *L (A Minor) (Police Investigation Privilege), Re* [1997] 3 WLR 16). While the administration of justice should not be frustrated by any party putting shackles in the path of his adversary, be it in whatever form, the fact whic h remains is that the property in a witness must still be subject to the claim of legal professional privilege. It is arguable to draw a distinction that the rule governing legal professional privileges is a matter of evidence as envisaged by s 126 of the Evidence Act 1950 and not a rule of property unlike in a witness or in the opinion of an expert witness (see *O'Reilly v The Commissioners of the State Bank of Victoria & Ors* (1983) 153 CLR 1 at pp 22;33-34, *Worall v Reich* [1955] 1 QB 296, *In re Saxton, decd* [1962] 1 WLR 968, and *Causton v Mann, Egerton (Johnson) Ltd* [1974] 1 WLR 162 at p 170. The privilege precludes the making of a judicial order to compel the production of a privileged document in the hands of a solicitor or client or a witness, and it also precludes the admission of the document in evidence when it is produced by the solicitor without the client's consent in breach of the confidentiality of the client's communication with him (see *Wilson v Rastall* 10 ER 1283 at p 1286 and *Sandford v Remington* 30 ER 587).

[21] The right of a party to a litigation to call a witness is crucial part of our judicial system but it is subject to the Legal Profession Privilege (see *Yap Hong Choon v Dr Pritam Singh* [2006] 1 CLJ 842 and recently that case was confirmed by the Court of Appeal in *Dr Pritam Singh v Yap Hong Choon* [2006] 1 MLJ 31 which was on pre-trial discovery pursuant to O 34 r 4(2) of the Rules of the High Court 1980.

[22] In *Young v National Coal Board* 1957 SLT 266; 1957 SC 99, Lord Justice-Clerk (Thomson) said:

> The Court has inherent power to compel the parties to a cause to produce documents which may have a bearing on the issues between them. The Court will not however in the ordinary run of things order production of documents which have been prepared in anticipation, or in development, of a party's case. Once the parties are at arm's length or are obviously going to be at arm's length, the details of their preparation of weapons and ammunition are protected as confidential.

[23] On the other hand, it is also important to observe that the legal professional privilege is not absolute or a blanket prohibition as it is trite law that the privilege is that of the client and the client may consent to disclose his instructions. Each case

A has to be looked at on the set of facts, circumstances and the background individually as there are some limitations placed upon it which is unnecessary to examine in this application. Professional privilege arguably should attach only to communication made for the sole purpose of giving or receiving advise or for use in anticipated or existing litigation as professional privilege is not absolute as there are also a number
B of circumstance in which evidence of confidential communication have been received which is again may not be necessary in the instant case to list out those circumstances (see *Grant v Downs* (1976) 135 CLR 674 at p 682, and *National Employer's Mutual General Insurance Association Ltd v Waind* (1979) 141 CLR. 648). It is also important to state a party should not be permitted to hide under the professional privilege or use it as a cloak in respect of documents which are the means of carrying out, or may
C be evidence of, transactions which may not themselves be giving or receiving of advice or part of the conduct of actual or anticipated litigation. Therefore, it is the considered view of this court that simply because the medical report is prepared by an expert appointed by the adversary on the examination of the plaintiff, it should not be extended outside the area of a claim for professional privilege. In this respect
D it is also important to observe that the principles referred to above to set aside a subpoena is not exhaustive. In *Baker v Campbell* (1983) 153 CLR 52 at p 68 it was held that 'although a report prepared by a proposed medical witness for the purpose of a pending action will be privileged from production by the defendant for whom it was prepared, it will not be privileged in a subsequent action for libel brought against the doctor who prepared the report' (see *Schneider v Leigh* [1955] 2 QB 195,
E *The Aegis Blaze* [1986] 1 Lloyd's Rep 203, *Calcraft v Guest* [1898] 1 QB 750, *Pearce v Foster* (1885) 15 QBD 114 and *Wheeler v Le Marchant* (1881) 17 Ch D 675).

[24] In the instant case, there is no material or evidence produced by the plaintiff of any agreement or condition express or implied between the parties for disclosure
F and exchange of this particular medical report or to be produced through the said expert witness (see *Oxfordshire Country Council v M & Anor* [1994] 2 All ER 269 at p 283 referred to in *Faridah Ariffin v Dr Lee Hock Bee & Anor* [2006] 1 CLJ 660). Therefore, the expert witness cannot be compelled to produce the medical report by the said subpoena for the reasons referred to above. (see majority decision in *Causton*
G *v Mann Egerton (Johnson) Ltd* [1974] 1 All ER 453, *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679).

[25] The privilege which is restricted to the legal profession serves to emphasise that the relationship between a client and his legal adviser has a special significance
H because it is part of the functioning of the law itself (see *Baker v Campbell* (1983) 153 CLR 52 at p 128).

[26] In *Rahman v Kirklees Area Health Authority* [1980] 3 All ER 610, Ormrod LJ at p 614 said:

I > Expert Evidence in an action for medical negligence or for professional negligence takes on an entirely different character, because the evidence is directed not to what the patient's condition is now or was as a result of the accident or what it is going to be in the course of time in order that damages can be assessed. The expert evidence in this case is directed to the crucial question: was the treatment correct or reasonable in the circumstances? (see also *Wilsler v Essex Area Health Authority* [1986] 3 All ER 801).

[27] In *Naylor v Preston Area Health Authority and other appeals* [1987] 2 All ER 354, Sir John Donaldson MR said at p 360:

> Basic objective is always the achievement of true justice, which takes account of time, money and what can only be described as the anguish of uncertainty, as well as of a just outcome. It has to be exercised on the basis that the procedure of the courts must be, and is, intended to achieve the resolution of disputes by a variety of methods, of which a resolution by judgment is but one, and probably the least desirable. Accordingly, anything which enables the parties to appreciate the true strength or weakness of their positions at the earliest possible moment and at the same time enables them to enter on fully informed and realistic discussions designed to achieve a consensual resolution of the dispute is very much in the public interest.

[28] In allowing the first defendant's application to set aside the subpoena (encl 58), this court wishes to summarise the grounds as follows:

(i) the plaintiff must be aware that the medical report which was prepared by the expert witness on the examination carried out on her on 19 May 2003 was in contemplation for use in the pending litigation which she has filed against the first defendant;

(ii) there is no evidence that the plaintiff had exercised her right to request for the medical report as a condition when she consented to the examination by expert witness. On the other, if she had exercised her right to request for the medical report, there is no evidence that the expert witness, or the first defendant or the solicitors had agreed to such a request as there is no affidavit evidence to this effect;

(iii) there is no evidence what had happened during the process of discovery of documents as provided by O 24 r 1(1) of the RHC and the exchange whether summons was taken out for parties to exchange expert reports as provided by O 34 r 4(2)(f) and (j) of the RHC (see *Dr Pritam Singh v Yap Hong Choon* [2006] 1 MLJ 31);

(iv) there was no affidavit in reply by the plaintiff to challenge the grounds of the first defendant's application (see *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 285 and *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382);

(v) there is no evidence that the plaintiff is aware of the contents of the medical report referred to in the subpoena. Therefore, the plaintiff's purpose of requiring the medical report to be produced is questionable and the reasonable inference which can be drawn is it is a fishing expedition, post item mortem;

[29] In conclusion, on the facts and circumstances referred to above, and considering the principles applicable to setting aside a subpoena and coupled with the doctrine of legal professional privilege as raised by learned counsel for the first defendant, and the submissions and the authorities cited, this court is of the considered view and is satisfied that the subpoena dated 28 August 2006 (encl 58) which was served on the expert witness Dato' Dr P Kandasamy should be aside for

A the reasons referred above. Accordingly the subpoena dated 28 August 2006 (encl 58) served on Dato' Dr P Kandasamy is set aside and order in terms of the summons in chambers (encl 64) is granted.

[30] Finally, it is hoped that good sense and some fair play will prevail among the
B parties so as to bring this unhappy dispute to an end or to a satisfactory conclusion.

Application allowed.

Reported by Peter Ling

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